82-592

No. A-119

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IN THE

Supreme Court of the United States

TERM _____

HENRY TIMOTHY FOULDS,

Appellant,

vs.

PENNSYLVANIA,

Respondents.

ON APPEAL FROM THE
SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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STATEMENT OF JURISDICTION

The questions presented by this appeal are:

a. Whether the lower court erred in failing to take judicial notice of a federal statute and whether the Superior Court erred in their ruling that any possible error in the lower Court's failure to take judicial notice of a federal statute was harmless beyond a reasonable doubt.

b. Whether when the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution guarantees of privacy are involved, a violation of that zone of reasonable expectation of privacy requires a clear showing of consent based upon evidence actually of record and cannot be based, as here, when no warrant was sought or issued, upon inferences not supported by the record.

TABLE OF CONTENTS

Statement of Jurisdiction i
Grounds for Jurisdiction 1
Constitutional Provisions 2
Statement of the Case 3
Consideration of Questions 6

STATUTES CITED:

21 U.S.C.A. §209 2
34 Pa. C.S.A. §780-102 2
35 Pa. C.S.A. §780-104 ..... 2, 3

APPENDIX

Order 1a
Motion for Extension of Time 2a
Notice of Appeal 5a
Letter dated May 5, 1982 from Marlene Lachman, Esq. to Robert P. Petyak, Esq. 7a
Judgment 8a
Per Curiam 9a
Memorandum Opinion 10a
Order 15a
Opinion of Hon. Ranck, J. 16a
Opinion of Hon. Krehel, P.J. 24a
Order of Hon. Peter Krehel 27a

IN THE

SUPREME COURT OF THE UNITED STATES

TERM _____

No. A-119

HENRY TIMOTHY FOULDS,

Appellant,

vs.

PENNSYLVANIA,

Respondents.

ON APPEAL FROM THE
SUPREME COURT OF PENNSYLVANIA

GROUNDS FOR JURISDICTION

This is an appeal from the final judgment of the Supreme Court of Pennsylvania, dated May 3, 1982, denying appellant's Petition for Allowance of Appeal. The Notice of Appeal herein was filed with the Supreme Court of Pennsylvania on July 9, 1982. Appellee received appellant's jurisdictional statement (Notice of Appeal) on July 9, 1982.

This appeal to Your Honorable Court is based upon 23 U.S.C. 1257(1)(2)(3), 28 U.S.C. 2101(d) and United States Supreme Court Rules 10, 11 and 12.

CONSTITUTIONAL PROVISIONS

The constitutional provisions and statutes that this case involves are as follows:

34 Pa. C.S.A. §780-102 Definitions

"Marihuana" consists of all forms, species and/or varieties of the genus Cannabis Sativa L., whether growing or not. . . .

35 Pa. C.S.A. §780-104 Schedules of controlled substances

The following schedules include the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated:

(1) Schedule I—In determining that a substance comes within this schedule, the secretary shall find: a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. The following controlled substances are included in this schedule: (iv) marihuana.

21 U.S.C.A. §209 Same; poisons; book entry of sale; labels

It shall be unlawful for any person, firm or corporation whose permanent allegiance is due to the United States to sell or deliver to any other person any of the following described substances, or any poisonous compound, combination, or preparation thereof, to wit: — cannabis indica. . . .

Article I, Section 8 of the Pennsylvania Constitution Security from searches and seizures

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize

any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Amendment 4 to the United States Constitution

Unreasonable searches and prohibited seizure

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

On or about the night of March 30, 1978 (T11) at 10:30 o'clock P.M. (T16) four police agents (T31, 42, 43, 45) without having made an attempt to get an arrest warrant or search warrant (T20, 21, 24, 32, 33) appeared at the residence of Appellant and his parents, undercover, uninvited and unannounced. (T31, 32, 33, 37, 43). The Appellant was arrested for violation of the Controlled Drug, Device and Cosmetic Act, 35 Pa. C.S.A. §780-104, and evidence seized; said arrest and seizure of evidence being based on information secured through the warrantless, uninvited, deceptive entrance into his private home after 10:00 o'clock P.M. at night, (T17, 25) by use of psychological duress on Appellant's mother and bold, uninvited entry past the shocked and physically intimidated mother of the Appellant, into the house, up the stairway, down the hallway to the rear of the second floor of the building and into the bedroom of the Appellant, where Appellant, ill at the time, was sleeping in bed with his wife (T31, 32, 33, 37, 39, 40, 41, 42 Suppression Finding of Fact No. 5).

A written omnibus pre-trial motion was filed with the Court of Common Pleas of Northumberland County on July 19, 1978. A hearing was held on that motion on August 28, 1978 before The Honorable Peter Krehel. On August 30, 1978, an Order was entered denying the Motion to Suppress.

On September 12, 1978, trial was held at No. CR78-104 of the Court of Common Pleas of Northumberland County and on September 13, 1982, Appellant Henry T. Foulds was convicted of criminal violations of the Controlled Drug, Device and Cosmetic Act, to wit: unlawful possession of a controlled substance with intent to deliver, and unlawful possession of a controlled substance.

At trial, during cross-examination of prosecution expert witness from the crime lab, Defense Counsel asked the witness if he tested the drug to determine if it was cannabis indica or cannabis sativa. The prosecution witness denied the existence of cannabis indica and admitted that he did not test the plant to determine if it was cannabis indica. Counsel for Appellant requested that the Court take judicial notice of 21 U.S.C.A. §209 which lists cannabis indica as a prohibited poison according to Federal Law. The Court refused to take judicial notice and Counsel for Appellant took exception. The Court instructed the jury to disregard the point and thus prevented the jury from considering whether the evidence was or could have been cannabis indica, which substance is not listed as a controlled substance in the Pennsylvania statute under which Appellant was charged.

On December 28, 1979, the Suppression Judge filed an opinion containing findings of fact and conclusions of law supporting the denial of the motion to suppress.

Post verdict motions were filed containing the issues of suppression of the evidence and failure to take judicial notice of the Federal Statute. Argument on the post ver-

dict motions was held on February 4, 1980. The post verdict motions were denied on April 29, 1980 with an opinion filed November 28, 1980, by The Honorable Samuel C. Ranck sitting as Court En Banc.

The opinion denying Appellant's post verdict motions did not address the question of error due to failure to take judicial notice of the Federal Statute.

Counsel for Appellant has not formally requested a copy of the trial transcript because at argument of post trial motions, it was discussed and agreed by Counsel and the Court that for reasons of time, judicial economy, and the single short exception to be argued from the trial record, the transcription of the notes of testimony would not be necessary.

Judgment of sentence was entered on June 5, 1980, by The Honorable Samuel C. Ranck, where the appellant was sentenced on the Following charges:

a. CR 78-104 (a) unlawful possession with intent to deliver a controlled substance—not less than one and one-half (1 ½) years and not more than five (5) years in a state correctional institution, Defendant to pay costs of prosecution.

b. CR 78-104 (b) unlawful possession of a controlled substance—six to twelve (6-12) months at a state correctional institution concurrent with CR 78-104 (a).

On February 17, 1981, the appellant perfected an appeal to the Superior Court of Pennsylvania from the April 25, 1980 Order denying post verdict motions and of judgment of sentence and was entered to Nos. 1293 and 1490 Superior Court of PA 1980—Philadelphia, Pa.

By order dated December 18, 1981, the Superior Court of Pennsylvania affirmed the judgment of the Court of Common Pleas of Northumberland County Criminal Division, entered to No. CR 78-104.

A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was filed on January 21, 1982. By Order dated May 3, 1982, the Supreme Court of Pennsylvania denied Appellant's Petition for Allowance of Appeal.

On July 9, 1982, a Notice of Appeal was filed with the Supreme Court of Pennsylvania and served upon the Appellee.

By Order dated August 4, 1982, The Honorable William J. Brennan, Jr., Associate Justice of the United States Supreme Court, extended the time for docketing the within appeal until and including September 30, 1982.

CONSIDERATION OF QUESTIONS

Appellant by his Counsel, Robert P. Petyak, Esquire, avers that the questions presented are so substantial as to require primary consideration, with briefs on the merits and oral argument, for their resolution, for the following reasons:

1. A substantial Fourth Amendment question is involved herein. A reading of the facts and circumstances contained in the record of the instant case reveals that what happened was a uniquely bold, uninvited, nightime, warrantless intrusion into the private home by undercover police agents who neither sought nor obtained consent to enter. Such a violation of public policy favoring the right to privacy in the home is so egregious as to warrant the invoking of the exclusionary doctrine to preserve the integrity of the judicial system and to discourage intolerable police conduct.

2. The supremacy of a Federal statute is involved. The failure to take judicial notice of which constituted error in that said failure violated claimant's right to a fair trial, to wit:

Pennsylvania statutes outlining marijuana prohibit specifically cannabis sativa. During jury trial, on cross-examination of the prosecution's expert witness from the crime lab, Defense Counsel asked the witness if he tested the substance to determine if it was cannabis indica or cannabis sativa. The prosecution witness denied the existence of cannabis indica and admitted that he did not test the plant to determine if it was cannabis indica. Defense Counsel requested the Court take judicial notice of Title 21, Section 209 of the United States Code which lists cannabis indica as a prohibited poison according to Federal Law. The Court refused and Counsel took exception.

Respectfully submitted,

/s/ Robert P. Petyak
Attorney for Appellant

215 Masonic Building
Ebensburg, Pennsylvania 15931

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-119

HENRY TIMOTHY FOULDS,

Appellant,

v.

PENNSYLVANIA

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including September 30, 1982.

/s/ Wm. J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 4th day of August, 1982.

UNITED STATES SUPREME COURT

File No.

COMMONWEALTH OF PENNSYLVANIA

vs.

HENRY TIMOTHY FOULDS

Appellant

MOTION FOR EXTENSION OF TIME

TO THE HONORABLE JUSTICE BRENNAN:

The Motion of Henry Timothy Foulds, by and through his Attorney, Robert P. Petyak, Esquire, respectfully prays your Honorable Court to grant an extension of sixty days (60) to docket the appeal in the above captioned matter for the following reasons:

1. Counsel, on his own accord, filed a Notice of Appeal with the proper Courts in the above matter.

2. Due to a breakdown in communications with the principal and his family, who are the source of resource for any appeals, Counsel for Appellant was notified on July 26, 1982, that Appellant's family would pay the costs and counsel fees for the appeal to the United States Supreme Court. In light of this fact, Counsel did not have time to have the proper materials drafted and printed for the purpose of having the appeal docketed in accordance with Rule No. 12 within the ninety (90) day period from the date of judgment.

3. A question raised by Appellant would more properly be presented by a Writ of Certiorari, however in accordance with 28 U.S.C. §2103, Counsel for Appellant

needs extra time to docket the appeal, whereon in accordance with §2103, an appeal taken would be looked and acted on as a Petition for Writ of Certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

4. Due to administrative delay at the Pennsylvania Supreme Court, Counsel for Appellant was recently admitted to the United States Supreme Court on July 19, 1982.

5. The interests of justice would be best served by the granting of this Motion.

Attached hereto and made a part hereof are copies of the lower Court Orders from which the appeal is taken.

WHEREFORE, your Petitioner, by and through his attorney, Robert P. Petyak, Esquire, respectfully requests Your Honorable Court to grant this extension.

Respectfully submitted,

Robert P. Petyak, Esquire
Attorney for Appellant

PROOF OF SERVICE

ROBERT P. PETYAK, ESQUIRE, being duly sworn according to law, deposes and says that he served a true and correct copy of the Motion for Extension of Time in the above captioned case upon the persons listed below, by regular mail on July 28, 1982.

R. Michael Kaar
Asst. District Attorney
37 Arch Street
Milton, Pa. 17847

James J. Rosini, District
Attorney
105 East Independence Street
Shamokin, Pa. 17872

J. A. Pritchard, Clerk
Supreme Court of Pennsylvania
256 City Hall
Philadelphia, Pa. 19107

J. Haniel Henry, Prothonotary
Superior Court of Pennsylvania
9th and Chestnut Streets
Rm 2044 Old Federal Court House
Philadelphia, Pa. 19107

The Honorable Samuel C. Ranck
Northumberland County Court House
Sunbury, Pa. 17801

The Honorable Peter Krehel
Northumberland County Court House
Sunbury, Pa. 17801

John Onesi, Court Reporter
Northumberland County Court House
Sunbury, Pa. 17801

Robert P. Petyak
Attorney for Defendant,
Appellant

NOTARIZED

NOTICE OF APPEAL

NOTICE is hereby given that Henry Timothy Foulds, Defendant Appellant above named, hereby appeals to the United States Supreme Court from the judgments entered by the following Courts:

Supreme Court of Pennsylvania
sitting at Philadelphia
No. 25-E.D. Allocatur Docket 1982
Judgment entered May 3, 1982

Superior Court of Pennsylvania
No. 298 and 1490 Philadelphia 1980
Judgment entered December 31, 1981

Court of Common Pleas
of Northumberland County
No. CR-78-104
Judgment entered April 29, 1980

This appeal is taken pursuant to 28 U.S.C. 1257 (1) (2) (3) 28 U.S.C. 2101 (d) and Rules 10, 11 and 12 of the United States Supreme Court.

Robert P. Petyak

ROBERT P. PETYAK, Esquire
Attorney for Defendant, Appellant
215 Masonic Building
Ebensburg, Pennsylvania 15931

PROOF OF SERVICE

ROBERT P. PETYAK, ESQUIRE, being duly sworn according to law, deposes and says that he served a true and correct copy of the Notice of Appeal in the above captioned case upon the persons listed below, by regular mail on July 9, 1982.

R. Michael Kaar
Assistant District Attorney
37 Arch Street
Milton, Pennsylvania 17847

James J. Rosini, District Attorney
Northumberland County
105 East Independence Street
Shamokin, Pennsylvania 17872

J. A. Pritchard, Clerk
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456 City Hall
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Philadelphia, Pennsylvania 19102

Samuel C. Ranck, Judge
Northumberland County
Court House
Sunbury, Pennsylvania 17801

John Onesi, Court Reporter
Northumberland County Court House
Sunbury, Pennsylvania 17801

Peter Krehel, President Judge
Northumberland County
Court House
Sunbury, Pennsylvania 17801

/s/ Robert P. Petyak

ROBERT P. PETYAK, Esquire
Attorney for Defendant, Appellant

LETTER DATED MAY 5, 1982 FROM MARLENE LACHMAN, ESQ. TO ROBERT P. PETYAK, ESQ.

RE: Commonwealth of Pennsylvania v.
Henry Timothy Foulds, Petitioner
No. 25 E. D. Allocatur Docket 1982

Dear Mr. Petyak:

This is to advise you that on May 3, 1982 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

/s/ Marlene Lachman

MARLENE LACHMAN, Esq.
Prothonotary

ML:jap
cc: Michael Kaar, Esq.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Northumberland County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ J. Haniel Henry

J. HANIEL HENRY
Prothonotary

Dated: 12/18/81

IN THE
SUPERIOR COURT OF PENNSYLVANIA

Nos. 1298 and 1490 Philadelphia 1980

COMMONWEALTH OF PENNSYLVANIA

vs.

HENRY TIMOTHY FOULDS,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas of Northumberland County, Criminal Division, at No. CR-78-104.

Before: SPAETH, HOFFMAN, and VAN DER VOORT, JJ.

PER CURIAM
(Filed December 18, 1981)

Judgment of sentence affirmed.

MEMORANDUM OPINION

Appellant contends the lower court erred in denying his motion to suppress a quantity of narcotics seized during a nighttime warrantless entry into his house. We disagree and, accordingly, affirm the judgment of sentence.

Appellant was arrested and charged with various narcotics offenses arising from the sale of a quantity of drugs to an undercover police officer. The lower court denied appellant's suppression motion, and a jury found him guilty of unlawful possession of, and possession with intent to deliver, a quantity of marijuana, hashish, and cocaine. Subsequently, the lower court denied appellant's post-verdict motions and imposed sentence. This appeal followed.

When ruling on a suppression motion the lower court must determine whether the Commonwealth has established by a preponderance of the evidence that the challenged evidence is admissible. Pa.R.Crim.P. 323(h); *Commonwealth v. Brown*, ____ Pa. ____, ____, 373 A.2d 1260, 1262 (1977); *Commonwealth v. Dixon*, 266 Pa. Superior Ct. 569, 572, 323 A.2d 55, ____ (1979). An appellate court must determine whether the record supports the suppression court's findings of fact, inferences, and conclusions of law. *Commonwealth v. Brown, supra; Commonwealth v. Goodwin*, 460 Pa. 516, 521, 333 A.2d 892, 895 (1975). If the suppression court denies the motion, the appellate court "will consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted." *Commonwealth v. Brown, supra. See Commonwealth v. Kichline*, 468 Pa. 264, 280, 361 A.2d 282, 290 (1976).

According to these standards, the evidence establishes the following: About 10:15 p.m. on March 30, 1978, an

informant told a police officer that he had just arranged by telephone to meet appellant at appellant's home to purchase some drugs. Minutes later the informant knocked on appellant's door with the plain clothes police officer standing behind him. Appellant's mother admitted them. After talking briefly to the informant she called up the stairs for appellant, who answered "huh." Upon hearing appellant's voice the informant walked up the stairs, explaining to the mother that appellant expected him because of an earlier phone call. The officer followed. Appellant greeted the two at his bedroom door, and after first name introductions, invited them into his bedroom. Appellant took samples of marijuana, hashish, and cocaine from his closet, discussed quantities, quality, and price, and agreed to sell a certain quantity of the drugs to the undercover officer. Then informant then left, purportedly to get a friend with money. Shortly thereafter, a second undercover officer knocked at the door, and was ushered in by appellant's mother who directed him upstairs. The two officers then showed their badges, arrested appellant, and seized the drugs involved in the transaction and some marijuana and drug paraphernalia that were sitting in plain view on a nightstand.

Appellant contends that the nighttime warrantless entry of his home violated his rights under the fourth amendment of the United States Constitution and under article I, section 8 of the Pennsylvania Constitution. We disagree. The Commonwealth presented sufficient evidence to sustain the lower court's finding that appellant's mother admitted the informant and the undercover police officer into the living room of the house. The mother's consent was binding upon appellant. *United States v. Matlock*, 415 U.S. 164, 172, 94 S. Ct. 988, 993, ___ L.E.2d ___, ___ (1974); *Commonwealth v. Latshaw*, 481 Pa. 298, 303, 392 A.2d 1301, ___, *cert. denied*, 441

U.S. 931, 99 S. Ct. 2050, 60 L.E.2d 659 (1978). Courts have consistently held that the ruse of an undercover agent misrepresenting himself as a potential buyer is an acceptable police strategem in enforcing narcotics laws. (Accordingly, the officer's concealing his identity here did not vitiate the mother's consent.) *Sherman v. United States*, 356 U.S. 369, 372, 78 S. Ct. 819, 820-21, 2 L.E.2d 84 (1958); *Commonwealth v. Brown*, 437 Pa. 1, 5-8, ___ A.2d ___, ___, (1970); *Commonwealth v. Weimer*, 262 Pa. Superior Ct. 69, 77, 396 A.2d 649, ___ (1978). The mother's calling appellant upon learning that the visitors wished to see him, and her not objecting as they walked up the stairs, raises the legitimate inference that her consent to enter extended to the upper floor. *Cf. Commonwealth v. Chism*, ___ Pa. ___, ___, 389 A.2d 1041, 1047 (1978) (search of upper floors valid when record contained no indication that consent was limited to first floor). The officer's progress was not so forced or abrupt as to intimidate the occupants or to deprive them of a reasonable opportunity to surrender their privacy voluntarily. *See Commonwealth v. DeMichael*, 442 Pa. 553, 561, 277 A.2d 159, ___ (1971); *Commonwealth v. Guyton*, 230 Pa. Superior Ct. 168, 175-76, ___ A.2d ___, ___ (1974) (HOFFMAN, J., dissenting). *Cf. Dorman v. United States*, 435 F.2d 385, 388 (D.C. Cir. 1970) (peaceful approach and announcing purpose factors in justifying entry); *Commonwealth v. Shaw*, 476 Pa. 543, 383 A.2d 496 (1978) (uniformed police officers rushing upstairs past defendant's sister, thus no consent to proceed to second floor). Appellant voluntarily exposed obvious criminal behavior to the officer and informant upon their arrival upstairs and thus took the risk of misplacing his confidence regarding that behavior. *Commonwealth v. Brown*, *supra* at 5-8, ___ A.2d at ___. The record indicates also that the mother fully consented to the second officer's entry. The officers were lawfully present in appellant's room and observed

him engaged in criminal conduct. They therefore had probable cause to arrest him, *see, e.g., Commonwealth v. Norwood*, 456 Pa. 330, 319 A.2d 908 (1974), to search him incident to that arrest, *see, e.g. Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L.E.2d 685 (1969); *Commonwealth v. Leatherbury*, ____ Pa. Superior Ct. ____, 409 A.2d 78 (1979), and to seize the evidence in plain view. *Harris v. United States*, 390 U.S. 234, 236, 88 S. Ct. 992, 993, 19 L.E.2d 1067, ____ (1968); *Commonwealth v. Flewellan*, 475 Pa. 442, 448, 380 A.2d 1217, ____ (1978). Accordingly, the lower court properly denied appellant's suppression motion.*

Appellant contends also that the lower court erred in failing to take judicial notice of a federal statute. We disagree. Appellant sought to impeach a prosecution witness who denied the existence of and failed to test for a form of marijuana allegedly known as "canabis indicia" by referring the witness to a federal statute allegedly distinguishing that specie from the "canabis sativa L." proscribed by Pennsylvania law. *See* 21 U.S.C.A. §209; 35 P.S. 780-104(1)(iv). Appellant's request that the court take judicial notice of the federal statute was subsequently denied. Appellant's request for judicial notice was irrelevant to the issues below, because our legislature, by the broad statutory definition of marijuana, intended to proscribe all "forms, species, and/or varieties of the genus Canabis Sativa L." *Commonwealth v. Her-*

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* Because the trust of any of the informant's out-of-court assertions about the phone call or its content are irrelevant to our disposition of the case, we need not decide whether hearsay is admissible at suppression hearings in Pennsylvania courts. *Cf.* United States v. Matlock, 415 U.S. 164 ____, 94 S. Ct. 988, ____, ____ L.E.2d ____, ____ (1974) (hearsay admissible in federal court suppression hearings); Commonwealth v. Williams, 262 Pa. Superior Ct. 508, 396 A.2d 1286 (1978) (finding admission of hearsay at suppression hearing to be harmless error).

man, ____ Pa. Superior Ct. ____, ____, 431 A.2d 1016, 1020 (1981) (noting that canabis indicia is merely the name given to canabis sativa L. grown in India). Moreover, because appellant had adequately placed the witness' credibility before the jury, any possible error in the court's refusal to take judicial notice of the federal statute was harmless beyond a reasonable doubt. *Commonwealth v. Laws*, 474 Pa. 318, 327-28, 378 A.2d 812, ____ (1977).

Judgment of sentence affirmed.

IN THE

COURT OF COMMON PLEAS
OF NORTHUMBERLAND COUNTY, PA.
CRIMINAL COURT DIVISION

No. CR-78-104

COMMONWEALTH OF PENNSYLVANIA

vs.

HENRY TIMOTHY FOULDS

ORDER

AND NOW, April 29, 1980, after careful consideration of the written and oral arguments of counsel, Defendant's Motions For New Trial and In Arrest Of Judgment are hereby DENIED.

The Defendant shall appear for Sentencing on Thursday, June 5, 1980, at 9:30 A.M., Court Room No. 1, Northumberland County Courthouse, Sunbury, Pennsylvania.

BY THE COURT:

/s/ Samuel C. Ranck
HON. SAMUEL C. RANCK,
Judge

OPINION

RANCK, J.

The Defendant, Henry T. Foulds, was found guilty by a jury of possession with intent to deliver a controlled substance, and with possession of a controlled substance. Prior to trial a suppression hearing was held before Krehel, P.J. to determine whether the arrest of the Defendant and seizure of the contraband was legal under the Fourth Amendment to the United States Constitution. Judge Krehel denied the Motion to Suppress by Order dated August 30, 1978. Subsequent to trial, timely Motions for New Trial and in Arrest of Judgment, as well as Supplemental Motions for New Trial were filed. Although trial was held on September 12, 1978, the transcript of the suppression hearing was not filed until October 29, 1979, and findings of fact were not filed by the suppression judge until December 28, 1979. Such motions were denied by this Court by Order dated April 29, 1980. Defendant appealed and this Opinion is written pursuant to Pa. R.A.P. No. 1925(a).

The facts as seen in the light most favorable to the Commonwealth, are as follows:

On the night of March 30, 1978, Trooper David Scallion of the Pennsylvania State Police was engaged in an undercover investigation into narcotics traffic in the Milton, Pennsylvania area. He was being assisted by one Michael McCloskey. At some time after 9:00 P.M., McCloskey used a telephone to contact the Fould's residence and arranged a meeting with the Defendant for later that evening. At approximately 10:30 P.M., Trooper Scallion and McCloskey arrived at the Defendant's residence. McCloskey knocked on the door, exchanged words with the Defendant's mother, and then both men entered the residence and followed the Defendant's

mother over to a staircase where she called up to the Defendant. He responded, and Trooper Scallion and McCloskey went up the stairs and down the hallway to the door to the Defendant's bedroom at which point McCloskey introduced Trooper Scallion to the Defendant. The Defendant took both men into his bedroom and a deal was struck whereby the Defendant would sell an assorted amount of marijuana, hashish, and cocaine to Trooper Scallion for a price of One Thousand Dollars.

At this time Trooper Scallion indicated that he did not have the money on his person, but that a friend out in the car had the money. McCloskey was sent out to get this "friend" who was in fact Trooper Watson, also of the Pennsylvania State Police. Trooper Watson, also operating undercover, entered the house after first knocking on the door and asking to see Tim (the Defendant) and Dave (Trooper Scallion). He also was directed upstairs to the Defendant's bedroom and at that time the Defendant was placed under arrest.

The grounds considered in disposing of the Defendant's motions were limited to those briefed and argued. See *Commonwealth v. Holzer*, 480 Pa. 93, 389 A.2d 101 (1978). The Defendant has preserved the following grounds:

1. The findings of fact at suppression are not supported by the record.

2. The Suppression Judge's statement of case law was incorrect as applied to the record of suppression.

3. The suppression Judge admitted hearsay on hearsay evidence from one unidentified phone caller to an identified individual who, though he did not testify, had told a policeman who testified the policeman did not state the statements of the informants, nor the underlying circumstances of the basis for either informant's opinion, nor

was there any indication of reliability of the informants or their hearsay on hearsay conclusions. The officer merely stated his own conclusions without stating their factual basis.

4. The Suppression Judge was not correct in ruling that the seizure i.e. arrest of Tim Foulds was not in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

5. The Suppression Judge was incorrect in not ruling that entry and the fruits of that entry of the undercover police officers by stealth and deception into the Foulds residence on the night in question were secured in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

6. The prosecution did not meet its burden of proof at suppression hearing to show by clear and positive evidence that the warrantless intrusion into the Foulds residence was reasonable within the meaning of the Fourth Amendment.

The one thread running through all of the Defendant's contentions is that the record fails to indicate that the police officers involved were invited into the house to do business with the Defendant. The Defendant claims that any evidence of invitation was hearsay and therefore inadmissible at the suppression hearing. Furthermore, the Defendant maintains that the Commonwealth failed to meet its burden of proof at the suppression hearing to establish admissibility by "clear and positive evidence." Both of these claims are incorrect.

As to the first point, hearsay is admissible at a suppression hearing. In *United States v. Matlock*, 415 U.S. 164, 39 L.Ed.2d 242 (1974), the United States Supreme Court observed:

"There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules aside from the rules of privilege should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel."

415 U.S. at 175, 39 L.Ed.2d at 252. The Court in *Matlock* held that "the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine admissibility of evidence." 415 U.S. at 172, 39 L.Ed.2d at 250.

Secondly, the Defendant has misstated the burden of proof on the Commonwealth at a suppression hearing. While the Defendant would have the Commonwealth subject to proving evidence admissible by "clear and positive evidence," the burden actually placed on the Commonwealth by law is the lesser standard of proving admissibility by a preponderance of the evidence. *Commonwealth v. Brown*, 473 Pa. 562, 375 A.2d 1260 (1977).

Keeping these two points in mind, it is apparent that there is sufficient evidence in the record to support the findings at the Suppression Hearing. The record contains the following testimony by Trooper Scallion:

Q. And could you explain to the Court the circumstances that surrounded that arrest?

A. Well, prior to Mr. Foulds being arrested, I was with the individual by the name of Michael McCloskey, who had made a phone call to the Foulds' residence —

N.T. p. 8.

MR. KAAR: Following the phone conversation, what activity or what physical acts did you engage in?

THE WITNESS: As a result of the phone call, it had been made known to me that Mr. Foulds may have had a minor's drugs at his house at that time.

N.T. p. 9-10. Following the conversations Trooper Scallion and McCloskey proceeded to the Defendant's residence where they met with the Defendant in the following manner:

Q. What happened at that time?

A. After we got into the house, we proceeded up to the second floor to a bedroom located to the rear of the house and at that point I was introduced to Mr. Foulds, on a first-name basis only.

N.T. p. 13. Thus, the evidence admitted at the Suppression Hearing, supported by the reasonable inferences which can be drawn therefrom, indicates that the Defendant invited the undercover operatives to his residence for the purposes of selling them drugs.

The crucial moment in the events of that night was when the Defendant met Trooper Scallion and McCloskey at his bedroom door. At that point he indicated no surprise at their presence, but rather accepted an introduction to the Trooper and then ushered them into his bedroom to conduct his business. This episode corroborates the testimony as to the earlier events when McCloskey called a phone number and spoke with a person purportedly the Defendant. Taken as a whole, the testimony indicates that this is a case where the Defendant finds himself in the position he is in today because of his lax associations with the persons who brought about his arrest, and not because of any illegal activities on the part of those persons. See LaFave, Search and Seizure—A Treatise on the Fourth Amendment (1978) §8.2(m).

Viewing this case as one involving an invitation to the undercover policeman to come to the Defendant's resi-

dence to do business, the case is governed by *Lewis v. United States*, 385 U.S. 206, 17 L.E.d.2d 312 (1966). In *Lewis*, the Court held:

> [W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.

385 U.S. at 211, 17 L.Ed.2d at 316.

In accord with *Lewis* is *Commonwealth v. Herron*, 243 Pa. Super. 319, 365 A.2d 871 (1976).

Therefore, for the reasons stated above, the Defendant was not deprived of any rights under the Fourth Amendment to the United States Constitution, and his post-trial motions were properly denied.

BY THE COURT:

Samuel C. Ranck, Judge
SAMUEL C. RANCK

Dated: November 28, 1980.

OPINION

KREHEL, P.J.

The Defendant, by his Attorney, Robert P. Petyak, Esquire, filed an Omnibus Pre-Trial Motion for Relief pursuant to Rule 306 of the Pennsylvania Rules of Criminal Procedure on 19 July 1978, concerned primarily with a Motion to Suppress Evidence. Hearing was held, and testimony taken, on 28 August 1978, following which on 30 August 1978, an ORDER was entered by which the said Motion was DENIED.

The ORDER, together with all pleadings, minutes of the proceedings, and various and sundry papers pertaining to the Motion were suppressed, as well as the transcript of testimony having been directed to be completed, were impounded. This Opinion, to undergird the ORDER of 30 August 1978, shall be and is hereby impounded.

Findings of Fact

1. On 30 March 1978, Defendant resided at R. D. #1, Milton, Pennsylvania, together with his Mother, Brother, and an unidentified girl friend.

2. At about 10:30 p.m. on 30 March 1978, State Police Trooper David N. Scallion, acting as an "undercover agent," accompanied by Michael McCloskey, an informant who had telephoned the Defendant at about 9:10 p.m., appeared at the entrance of Defendant's residence.

3. Trooper Scallion (in plain clothes) did not have a search warrant, nor an arrest warrant, but had the purpose of entering into a drug deal with the Defendant through arrangements of the informant, Michael McCloskey.

4. Defendant's mother admitted Trooper Scallion and Mr. McCloskey to enter the residence, and informed them that Defendant was in an upstairs bedroom. There was no forcible entry.

5. The Trooper and McCloskey entered the Defendant's bedroom, where McCloskey introduced the Defendant to the Trooper on a first-name basis. The only other person in the bedroom was Defendant's girlfriend, asleep and covered on the bed.

6. Some drugs were visible—in plain view—on the bedroom night stand; others were taken by the Defendant from the bedroom closet, all of which included approximately ten small white bags of a white substance alleged to be cocaine, five plastic bags containing a vegetable substance alleged to be marijuana, and two plastic bags allegedly containing hashish, with the said variety of drugs offered to be sold by the Defendant to Trooper Scallion for One Thousand ($1,000.00) Dollars.

7. After the bargain was struck, Mr. McCloskey went outdoors to get Trooper Foster G. Watson, also in plain clothes, as an "undercover agent," to get the money for the drug sale transaction.

8. Trooper Watson entered the bedroom ten minutes later—alone—showed his identification as a State Police Trooper, read the Miranda warnings to the Defendant, seized the visible contraband, and arrested the Defendant.

9. Neither Trooper looked into the bedroom closet, nor searched the premises or person of the Defendant. Neither the unidentified girlfriend nor the Mother, nor the Brother of the Defendant were arrested.

Discussion and Applicable Law

Defendant's Counsel, in his Brief submitted 12 September 1978, frames what he believes to be the issue in

this case, as "the admissibility of evidence seized when an undercover government agent, without a search warrant nor an arrest warrant nor an invitation to enter defendant's home, by stealth and deception sought defendant's mother's consent to enter defendant's home at night, at 10:30 o'clock p.m., when the agent's purpose is an exploration to gather information on drug deals and to enter into a drug deal with defendant for the purpose and intention of seizing contraband and placing defendant under arrest."

Counsel cites *Commonwealth vs. Wright*, 411 Pa. 81, 190 A.2d 709 (1963), *U.S. vs. Haden*, 397 F.2d 460, cited in *Comm. vs. Brown*, 437 Pa. 1 (1970), in an effort to frame his issue, as well as quotes extensively from the Preliminary Hearing. He emphasizes the Fourth Amendment protection held in *Lewis vs. United States*, 385 U.S. 206 (1966), 87 Sup. Ct. Reporter 424 (1967).

Commonwealth Counsel points out that the *Wright* case stands for "consent and search," while the instant case turns on "arrest and seizure," quite distinguishable.

Further, Commonwealth Counsel distinguished the *Brown* case, by pointing out that it involved a hand-gun obtained by a policeman, not under any investigative proceedings, and after the weapon was tested ballistically, it was found to have been used in a crime of which the Defendant-Brown was unaware.

The *Haden* case cited in the *Brown* opinion, reveals that the Fourth Amendment offers no protection to those who mistakenly place their confidence in such undercover government agents.

Such was the set of circumstances in the instant case.

The Defendant was lax in his association with people who brought about his own arrest. He had accepted a 'phone call from McCloskey about 9:10 p.m. about a

buyer to come to his residence. Emily Post may have frowned about this 10:30 p.m. visit, but neither the Defendant, nor his Mother, nor Brother, were asleep. Only his unidentified girlfriend was under cover, asleep.

Defendant's Counsel stressed in his Brief "issue" and his closing remarks at hearing, that there was no "invitation to enter Defendant's home," but there was a 'phone call alert, and we emphasized that this was NOT a search. There was a seizure, subsequent to arrest.

Where was the "stealth?" Scallion and McCloskey came through the front door. They were not challenged for identification, nor was Watson on his later appearance on the scene.

Where was the "deception?" The Defendant conducted himself like a businessman displaying his wares. No last names were asked, no inquiry of Scallion's personal activities, employment, or associations. Even the *Lewis* case does not require police persons to be open completely, nor to be truthful when dealing with suspects.

Scallion's purpose, on the *cutting edge* of entry with McCloskey, was to enter into a drug deal with the Defendant, who displayed his products in plain view and identified them, striking a bargain for One Thousand ($1,000.00) Dollars.

Watson's purpose, again with the *shoe-horn* help of McCloskey was to identify himself, read the Miranda warnings, arrest the Defendant, and seize the "visible" contraband.

These undercover agents performed their duties and achieved their purposes. The ORDER of 30 August 1978, logically follows.

This OPINION, sustaining the ORDER filed to this matter on 30 August 1978, shall be and is hereby impounded, and disclosure of the nature and purpose of the Hearing to which it refers, or of this OPINION, to anyone except the Court, Defendant, and Counsel for the parties is prohibited. The record of these proceedings shall remain impounded until after final judgment, unless it becomes necessary to use the same for purposes of impeachment.

BY THE COURT:

/s/ Peter Krehel
HON. PETER KREHEL
President Judge

Dated: 29 December 1979

ORDER

AND NOW, this 30th day of August 1978, the Omnibus Pre-Trial Motion of the Defendant, HENRY TIMOTHY FOULDS, to Suppress Evidence is hereby DENIED.

This Order, together with all pleadings, notes of testimony, minutes of the proceedings, as recorded by the Prothonotary of the Criminal Court Division, Court of Common Pleas of Northumberland County, and all other various and sundry papers pertaining to this Petition to Suppress, shall be and is hereby impounded, and disclosure of the nature and purpose of this hearing, or of this Order, to anyone except the Court, Defendant, and Counsel for the parties is prohibited. The record of these proceedings shall remain impounded until after final judgment, unless it becomes necessary to use the same for purposes of impeachment.

BY THE COURT:

/s/ Peter Krehel
HON. PETER KREHEL
President Judge